



**Review report under the  
Government Information (Public Access) Act 2009**

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<b>Applicant:</b>	<b>Dr John Kaye</b>
<b>Agency:</b>	<b>University of New South Wales</b>
<b>OIC reference:</b>	<b>11-138</b>
<b>Date review request received:</b>	<b>17 May 2011</b>
<b>Date of this report:</b>	<b>26 April 2012</b>

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**Summary of this report**

1. Dr Kaye made an application under the *Government Information (Public Access) Act 2009* (the GIPA Act) for information held by the University of New South Wales (UNSW). The request was for email communication between two people, between a specified timeframe. UNSW identified information falling within the scope of the application, but refused to provide access to the information as it was of the view that there is an overriding public interest against disclosure as the information contained personal information.
2. The decision does not identify whether any person has been consulted in regard to the use of their personal information, nor does it demonstrate whether this was considered when applying the public interest test as required.
3. We have reviewed the UNSW decision to refuse access to the information. We recommend that it make a new decision, which considers the requirement to consult and applies the public interest test, providing more details of its consideration process.

**The information sought**

4. The information sought is:

*All emails and communications between UNSW Director of Operations and [a] Private Investigator, between September 2009 to December 2010.*

5. The UNSW identified a letter from the Director of Operations to the investigator, which met the terms of the request.

## **The reason for refusal**

6. The UNSW decision references clauses 3(a) and 3(b) of the Table to section 14. It states that release of the information would:
  - a. Reveal an individual's personal information,
  - b. Contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998*

## **The need for consultation**

7. Section 54 of the GIPA Act provides that an agency must take steps to consult with a person before it provides access to information, if that information includes that person's personal information and they may reasonably be expected to have concerns about its disclosure.
8. The Notice of Decision makes no reference to any consultation occurring.
9. The purpose of consultation is to establish whether a consideration against disclosure exists in the Table to Section 14 of the GIPA Act. Once established, the reasons identified during the consultation process only provide weight, if any, to the consideration/s against disclosure. The reasons in themselves do not automatically mean that access to information should be refused.
10. The Information Commissioner has published Guidelines in relation to both personal information and consultation on public interest considerations under the GIPA Act. These are available on the OIC website. However, I have attached them for ease of reference as they provide helpful guidance. In particular, I draw attention to Part 3 of Guideline 4 which relates to personal information as a public interest consideration against disclosure.

## **Has the UNSW applied the public interest test?**

11. In considering whether or not to disclose information, UNSW must weigh the relevant public interest factors for and against disclosure. Section 5 of the GIPA Act says that there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure. Section 13 says there will be an overriding public interest against disclosure only if the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure.
12. This means that UNSW should start with a presumption that information must be released.
13. The object of the GIPA Act is to promote a system of responsible and representative democratic government that is open, accountable, fair and effective. Section 12 of the GIPA Act says that there is a general public interest in favour of the disclosure of government information. It gives some examples of relevant public interest factors, but it is not an exhaustive list and an agency is free to identify other considerations in favour of disclosure.
14. UNSW has not identified any public interest considerations in favour of disclosure. These should be identified and balanced with those public interest considerations against disclosure, in order to decide whether or not there is an overriding public interest against

disclosure. Therefore UNSW has failed to take an essential step in carrying out the public interest test.

15. The considerations in clauses 3(a) and 3(b) of the Table to section 14 may be relevant considerations against disclosure in this case. However, the notice needs to outline how these considerations outweigh the public interest considerations in favour of disclosure.
16. As the Notice of Decision refers to the contravention of a Privacy Protection Principle, it should outline which Principle and identify how it is (or would be) contravened.
17. The GIPA Act at section 74 allows for information to be deleted in order to disclose information that would otherwise not be disclosed. It would be helpful to outline whether this has been considered. For example, UNSW may have considered redacting information such as names in order to facilitate disclosure.
18. When writing its decision in response to an access application, UNSW should list the considerations for and against disclosure that it has taken into account and explain why the considerations identified apply to the information sought.
19. It then needs to assign weight and balance the considerations. Information must be released unless the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure.
20. To assist in understanding how to fully apply and document the application of the public interest test, I have attached an OIC seminar resource titled "How to apply the public interest Test".

## **Our recommendations**

21. We recommend that in accordance with section 93 of the GIPA Act, UNSW make a new decision within 15 working days (subject to any permissible extensions under the GIPA Act) by way of internal review.
22. We ask that UNSW advise Dr Kaye and us by **4 May 2012** of the actions it intends to take in response to our recommendations.

## **Review rights**

23. Our recommendations are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the Administrative Decisions Tribunal (ADT) for a review of that decision.
24. If Dr Kaye is dissatisfied with:
  - a. our recommendations, or
  - b. UNSW's response to the recommendations,
25. Dr Kaye may ask the ADT to review the original decision of the agency.
26. An application for ADT review can be made up to 20 working days from the date of this report. After this date, the ADT can only review the decision if it agrees to extend this deadline.

27. For information about the process and costs associated with a review by the ADT, please contact the ADT. The ADT's contact details are:

Administrative Decisions Tribunal  
Level 10, 86 Goulburn Street,  
Sydney, NSW, 2000  
Telephone (02) 9377 5711  
Facsimile (02) 9377 5723  
TTY (02) 9377 5859  
Internet <http://www.lawlink.nsw.gov.au/adt>  
e-mail [ag\\_adt@agd.nsw.gov.au](mailto:ag_adt@agd.nsw.gov.au)

28. If UNSW makes a new reviewable decision as a result of our review, Dr Kaye will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the OIC or ADT.

## **Closing our file**

29. This review is now closed.

30. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Level 11, 1 Castlereagh Street, Sydney NSW 2000 • GPO Box 7011, Sydney NSW 2001  
t 1800 INFOCOM (1800 463 626) • f 02 8114 3756 • e [oiinfo@oic.nsw.gov.au](mailto:oiinfo@oic.nsw.gov.au)

[www.oic.nsw.gov.au](http://www.oic.nsw.gov.au)

[Attachment 1 – Guideline 4 – Personal information](#)

[Attachment 2 - Guideline 5 – Consultation](#)

[Attachment 3 – Seminar Resource “How to apply the public interest test”](#)